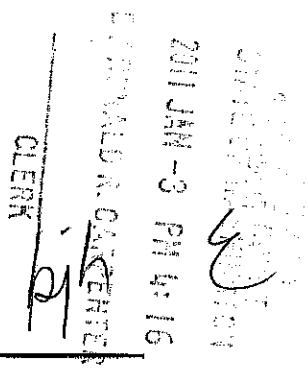
No. 83937-9

SUPREME COURT
STATE OF WASHINGTON



MASON CONSERVATION DISTRICT,

APPELLANT,

v.

JAMES R. CARY, individually, and **MARY ALICE CARY,** individually and the marital community comprised thereof; **JOHN E. DIEHL,** individually and **WILLIAM D. FOX, SR.,** individually;

RESPONDENTS

v.

MASON COUNTY, DEFENDANT.

MASON CONSERVATION DISTRICT'S BRIEF IN RESPONSE TO BRIEFS OF AMICUS CURIAE

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I. INTRODUCTION

Mason Conservation District submits this response to the amicus curiae briefs submitted in this matter.

II. ANALYSIS

A. The Court should decline to address claims being raised for the first time by amicus curiae.

The Court should decline to address the claims being raised for the first time by amicus curiae that the charge authorized by RCW 89.08.400 can be defended only as a "special assessment."

"It is a well-established rule that new issues may not be raised for the first time on appeal by amicus curiae." RAP 9.12; *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 495 fn. 12, 120 P.3d 564 (2005); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 649, 71 P.3d 644 (2003); *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413, 997 P.2d 915 (2000); *Harmon v. Dep't of Soc. & Health Services*, 134 Wn.2d 523, 544, 951 P.2d 770 (1998).

The Petitioners in this case have consistently framed the issue being presented as whether, under the test set forth in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), the $5.00-per-parcel charge which the

Legislature has specifically authorized the Board of Commissioners to impose for the benefit of the Mason Conservation District constitutes a tax or regulatory fee:

- This is how the Petitioners framed the issue to the trial court. CP 135-36 (Motion for Summary Judgment at 6-7).

- This is how the trial court understood the issue it was being asked to decide. CP 48-49 (trial court describes the issue which Petitioners asked it to decide as whether this charge was like a tax or a regulatory fee).

- This is how Petitioners framed the issue to the Court of Appeals. See Respondents/Cross-Appellants Response Brief at p. 29 ("Whether a charge imposed by a governmental entity is a tax or a 'regulatory fee' in the broadest sense depends on three factors identified in the leading case on this point, *Covell* . . . .").

- Because this was how the Petitioners framed the issue, this was the issue the Court of Appeals addressed. See *Cary v. Mason County*, 152 Wn. App. 959, 964-66 at ¶¶ 8-13, 219 P.3d 952 (2009).

It would be patently unfair to the Conservation District to strike down its main source of funding without the District ever having the opportunity to develop a record with respect to this new "special assessment" issue. The Court should decline to address this new issue, raised for the first time by amicus curiae.

B. Those asking the Court to strike down the charge authorized by RCW 89.08.400 bear the heavy burden of demonstrating that the charge is unconstitutional beyond a reasonable doubt.

Petitioners/Amicus ask the Court to strike down the charge specifically authorized by RCW 89.08.400. They bear the heavy burden of demonstrating that the charge is unconstitutional beyond a reasonable doubt.

This case is different than most regulatory fee cases that this Court has reviewed. In most cases, the Court is asked to review a charge whose imposition originates in a local governmental body's police power, where the local body acts without the express authorization of the Legislature. The issue presented in such cases is whether the local body should be allowed to impose the charge without the express authorization of the Legislature.

In this case, in contrast, the Legislature's intent is crystal clear. The Legislature has specifically delegated to each local county legislative authority the power to impose an assessment for the benefit of local conservation districts. RCW 89.08.400. The Legislature also set forth in detail the procedure which the county legislative authority is to follow in imposing the charge, declared that the county legislative authority's findings in support of the charge are "final and conclusive," provided for no judicial

review, and established a nonjudicial remedy pursuant to which 20 percent of the assessed property owners can nullify the assessment. *Id.* The Legislature has done all this in furtherance of its expressly articulated public policy of conserving the natural resources of this state. RCW 89.08.010.

Statutes enacted by the Legislature are presumed to be constitutional. Those asking this Court to hold this statute unconstitutional bear the heavy burden of proving that the statute is unconstitutional beyond a reasonable doubt. *School Districts Alliance for Adequate Funding of Special Education v. State*, ____ Wn.2d _____, ¶ 11, _____ P.3d _____ (December 9, 2010). In order to strike down a statute, the Court must be fully convinced, after a searching legal analysis, that the statute violates the constitution. *Id.* at ¶ 13, quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

By enacting this statute, the Legislature made a clear and emphatic policy decision. That statute, and the policy decision underlying it, has been in effect for more than 20 years. Those challenging this statute must establish the unconstitutionality of both beyond a reasonable doubt. They have not met this burden.

C. The Court should evaluate the constitutionality of this charge by examining its characteristics.

As this Court has repeatedly ruled, it should evaluate the constitutionality of the charge authorized by RCW 89.08.400 not by looking at its name, but by examining its characteristics.

When faced with a challenge to the constitutionality of a charge imposed by the government, this Court has specifically held that the charge's name does not control, but that the Court will examine the characteristics of the charge in order to determine its true nature: "Courts must therefore look beyond a charge's official designation and analyze its core nature by focusing on its purpose, design and function in a real world." *Samish Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 806, 23 P.3d 477 (2001). See also *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 650, 62 P.3d 462 (2003); *King County Fire Prot. Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 833 and fn. 30, 872 P.2d 516 (1994).

Without citing to any authority, certain amici contend that the foregoing facially neutral rule in fact should be applied only if it would result in the striking down of a charge authorized by the Legislature. See Evergreen Freedom Foundation ("EFF") Amicus Brief at p. 13. That suggestion wholly

ignores the deference which this Court extends to policy decisions made by the Legislature.

Here, the Legislature acted to allow county legislative authorities to impose this charge for the benefit of conservation districts. The Legislature intended to create a fund to be used to deal with the erosion caused by, and pollution contained within, stormwater runoff. The Legislature specifically authorized the county legislative authority to impose this charge upon the owners of non-forested parcels from whose properties this stormwater runs off. The Legislature directed the county legislative authority to collect these funds for the benefit of conservation districts, entities whom the Legislature created especially to take charge of the task of addressing the impact of this stormwater runoff. RCW 89.08.400.

The Legislature intended its actions to be effective. The Legislature intended to ensure that conservation districts have a (modest) source of funding so that they can carry out their mission of conserving the natural resources of this state. RCW 89.08.010.

The Court should uphold this statute if there is any way the Court can reasonably interpret it to be constitutional. See, e.g., *State v. Eaton*,

168 Wn.2d 476, 480 ¶ 6, 229 P.3d 704 (2010); *Residents Opposed to Kittitas Turbines v. State Energy Facility*, 165 Wn.2d 275, 299 ¶ 47, 197 P.3d 1153 (2008). There is not the slightest evidence that the Legislature intended for this Court to uphold its statute only if it passed constitutional muster as a "special assessment" rather than a "regulatory fee." Therefore, granting the Legislature's policy decision the deference to which it is due, the Court can and should uphold this statute as a "regulatory fee."

D. Because the charge possesses all the characteristics of a regulatory fee, it should be analyzed and upheld as a regulatory fee.

Because the charge, which the Legislature has, in RCW 89.80.400, authorized the county legislative authority to impose for the benefit of a conservation district possesses all the characteristics of a regulatory fee, it should be analyzed and upheld as a regulatory fee.

In *Covell v. City of Seattle*, this Court held that, for purposes of constitutional analysis, a charge would be upheld as a valid regulatory fee if it possessed the following characteristics:

- "[T]he primary purpose [is] . . . to regulate."
- "[T]he money collected [is] allocated . . . only to the authorized . . . purpose."

- There is "a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer."

Covell v. City of Seattle, 127 Wn.2d 874, 879, 905 P.2d 324 (1995).

In this case, the Court of Appeals unanimously held that the charge at issue possessed each of these three characteristics. See *Cary*, 152 Wn. App. at 964-65, ¶ 10. The charge is imposed only on those persons who own property from which stormwater runs off, creating a risk of erosion and pollution. CP 53. "[I]t rains everywhere and all parcels . . . benefit from a system which manages the quantity and quality of storm and surface water runoff to prevent flooding, erosion, sedimentation, pollution, and danger to life and property." *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 749, 167 P.3d 1167 (2007). And, as the Petitioners themselves expressly admitted, "[t]he monies collected under [the] ordinance . . . have been spent mainly to improve water quality in Mason County." CP 95. The charge thus regulates, because it provides those charged with a targeted service, and alleviates a burden to which those paying it contribute. *Samish Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001).

Second, the money collected is allocated only for the authorized purpose. See *Cary*, 152 Wn. App. at 965, ¶ 11. The funds are maintained by the conservation district in a segregated account, and used only for the purpose of providing targeted services to those charged the fee, or for the purpose of preventing and/or dealing with the effects of erosion and pollution caused by stormwater runoff from the properties whose owners are charged the fee. CP 55.

Finally, there is a direct relationship between "the fee charged and the burden produced by the fee payer" and there is "a direct relationship between the fee charged and the service received by those who pay the fee." See *Cary*, 152 Wn. App. at 965-66, ¶¶ 12-13. Stormwater runs off from every property whose owner pays this charge, and the aggregated stormwater runoff causes erosion and picks up and concentrates pollution, which creates the "public burden" that the Conservation District addresses by using the monies collected. CP 56. And, the Conservation District makes its services available to all assessed property owners, and only to assessed property owners, on a nondiscriminatory basis. CP 54. The availability of these services to each property is a benefit to those properties, whether or not a specific property

owner actually uses them. *Otis Orchards Co. v. Otis Orchards Irr. Dist.*, 124 Wash. 510, 513-14, 215 Pac. 23 (1923). There is, therefore, a direct relationship both between the fee charged, and the burden produced/service received.

Certain amici assert that the charge which the Legislature has specifically authorized the county legislative authority to impose for the benefit of the conservation district must be analyzed, and can only be upheld, if it meets the test for a "special assessment." They are wrong.

EFF repeatedly asserts that this alleged test has its roots in Wash. Const. Art. VII, § 9. See, EFF Amicus Brief, fns. 2, 7. But, the constitutional limitations imposed by Art. VII, § 9 on their face apply only to "cities, towns, and villages," not to counties. *Bilger v. State*, 63 Wash. 457, 469, 116 Pac. 19 (1911). See also *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502, 511, 171 Pac. 539 (1918); *Hansen v. Hopmer*, 15 Wash. 315, 319, 46 Pac. 332 (1896). There simply is no limitation rooted in the constitution upon the Legislature's authority to delegate its power to a county legislative authority.

Amici also complain that the District and the County did not individually quantify the benefit received and the charge imposed on each

property owner. But, this Court in *Covell* squarely held that the governmental entity imposing a charge is NOT required to individualize the fee according to the specific benefit available to or the burden produced by the fee payer. *Covell v. Seattle*, 127 Wn.2d at 879.

The charge is also substantially indistinguishable from a similar flat, per-parcel charge which this Court has squarely held to be a valid regulatory fee. *Teter v. Clark Co.*, 104 Wn.2d 227, 704 P.2d 1171 (1985) (flat, per-parcel charge imposed upon all residential property owners to address the cumulative impacts of stormwater running off from the property owners property upheld as a legitimate regulatory fee). See also *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 749, 167 P.3d 1167 (2007); *Storedahl Properties LLC v. Clark Co.*, 143 Wn. App. 489, 178 P.3d 377 (2008).

Amici attempt to analogize to cases that do not involve stormwater. See, e.g., EFF Brief at p. 15 & fn. 56. Unlike the fact pattern in those cases, charges related to stormwater fit the test for a regulatory fee very closely. Unlike with respect to street utility charges and ambulance charges, the need for which is generated by property owners, tenants, and visitors alike,

stormwater runoff *is* directly associated with the existence of non-forested parcels. Runoff from such parcels *does* create a public burden by causing erosion and picking up, carrying, and concentrating pollution. The monies collected as a result of the charge imposed on non-forested parcels from which stormwater runs off is made available only to provide benefits to the owners of assessed property, or to alleviate the harms arising from the erosion and pollution caused by the stormwater running off from the assessed properties. There thus *is* in this case the kind of a direct relationship between the charge, burden, and benefit that is simply not present in the cases cited by amici, where charges alleged to constitute invalid regulatory fees were struck down.

The charge looks like a regulatory fee. It is indistinguishable from stormwater-related charges treated as regulatory fees in *Teter* and other recent cases. And, it passes constitutional muster as a regulatory fee. Therefore, the charge should be analyzed, and upheld, as a regulatory fee.

E. Even if this Court were to analyze the charge as a special assessment, it constitutes a valid special assessment.

Finally, even if this Court were to analyze the charge as a special assessment, it constitutes a valid special assessment.

The Mason Conservation District adopts the arguments of King County, the Washington State Conservation Commission, and the Washington Association of Conservation Districts in this regard.

In particular, in seeking to challenge the validity of a special assessment, Petitioners have the burden of presenting competent appraisal testimony establishing that the value of their property did not increase by the amount that they were assessed. See, e.g., *Hansen v. Local Imp. Dist. No. 335*, 54 Wn. App. 257, 262-63, 773 P.2d 436 (1989). Petitioners failed to present any such testimony here, so any claim that the charge was an invalid special assessment fails for this reason (as well as the reasons expressed in the above-mentioned amici briefs).

F. The Mason County Board of County Commissioners also imposed the charge in compliance with the requirements of RCW 89.08.400.

The Mason County Board of County Commissioners also imposed the charge in compliance with the requirements of RCW 89.08.400.

1. The Legislature did not intend to vest the courts with jurisdiction to consider statutory claims.

First, the Legislature did not intend to vest the courts with jurisdiction to consider statutory claims.

The Legislature's intent is apparent on the face of the statute. The Legislature expressly provided that the county legislative authority's findings were to be "final and conclusive." Compare *Washington Fed'n of State Employees v. State Pers. Board*, 23 Wn. App. 142, 148-49, 594 P.2d 1375 (1979) (statute which explicitly provided that administrative decision shall be "final" precluded judicial review). And, the Legislature did not provide for judicial review. Instead, the Legislature explicitly provided those upon whom the charge was imposed with a simple and expeditious nonjudicial remedy. RCW 89.08.400(5) (assessment to cease upon filing of petition signed by a mere 20 percent of affected property owners).

The Legislature intended for the benefit of the modest charge which it authorized county legislative authorities to impose for the benefit of conservation districts to be expended on the conservation of natural resources, not on legal fees. The Court should hold that it lacks jurisdiction to consider any statutory claim.

2. No statutory claim was timely asserted.

Second, no statutory claim was timely asserted.

RCW 36.32.330, on its face, applies to Petitioner's statutory claims. It provides:

> Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within 20 days after the decision or order, . . .

Here, Petitioners' appealed the decision of the Mason County Board of County Commissioners to Superior Court. Their challenges to the allegations that the Commissioners failed to comply with the procedures set forth in RCW 89.08.400 fall *squarely* within the ambit of the above-quoted statute. But the Petitioners did not file their claims within 20 days of the Board's enactment of the ordinance; they waited more than six months to do so. The Court should hold all statutory claims to be time barred.

3. By stating the assessment as specified in RCW 89.08.400(3), the Mason County Board of County Commissioners complied with the statute.

By stating the assessment as specified in RCW 89.08.400(3), the Mason County Board of County Commissioners complied with the statute.

RCW 89.08.400(3) states (emphasis added):

> An annual assessment rate shall **be stated** as either uniform annual per acre amount, or an annual flat rate per parcel plus a uniform annual rate per acre amount, for each classification of land. The maximum annual

> per acre special assessment rate shall not exceed ten cents per acre. The maximum annual per parcel rate shall not exceed five dollars. . . .

Here, the Mason County Board of County Commissioners' Ordinance 121-02 meets both the procedural and substantive criteria set forth in RCW 89.08.400(3). The first sentence of RCW 89.08.400(3) only requires the assessment to "be stated" in a certain way. Here, the ordinance describes the assessment rate as being $5.00 per parcel and $0.00 per acre. CP 65, 97. By stating the assessment rate in this form, the Commissioners complied with the requirement imposed by the first sentence of this statute.

The ordinance also complies with the substantive limitations on rates imposed by the second and third sentences. The ordinance sets the assessment rate at a rate less than the maximums permitted by the Legislature. The ordinance therefore fully complies with this statute, construed according to the actual words the Legislature used.

EFF claims that the Legislature intended to require the county legislature authority to impose a positive per-acre charge—no matter how small—while prohibiting the use of a $0.00 per-acre charge. If the Legislature had intended to impose a substantive limitation on the minimum amount to be

charged, it would have said so in language as plain as that with which it imposed a substantive limitation upon the maximum amount to be charged. But that is not what the statute says.

EFF's claim also makes no sense. Why would the Legislature intend to authorize the county legislative authority to impose de minimis per-acre charge but forbid a charge of $0.00 per acre? Especially when the lower charge, by saving administrative expense, would actually produce more revenue? Those challenging this ordinance have not offered any answer to these questions.

The Mason County Board of County Commissioners complied with both the procedural and substantive requirements of RCW 89.08.400 in imposing this charge.

III. CONCLUSION

The Legislature acted reasonably in authorizing the county legislative authority to impose the charge authorized by RCW 89.08.400. The Court should affirm the constitutionality of this statute, and hold that it was properly applied by the Mason County Board of County Commissioners in this case. The Court should affirm the unanimous decision of the Court of Appeals.

DATED this 3rd day of January, 2011.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.

Matthew B. Edwards, WSBA #18332

CERTIFICATE OF SERVICE

I hereby certify that I deposited a complete copy of the Appellant Mason Conservation District's Brief in Response to Amicus Curiae, including this Certificate of Service, to the following this 3rd day of January 2011.

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